(36,695)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 40

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1930

No. 6377

JOHN N. MCLEAN and HERBERT P. ROBINSON

vs.

MILLER ROBINSON COMPANY

DOCKET ENTRIES

Jacob Weinstein for B. L. Shapiro.
Sidney E. Smith for Receivers.

Jan. 12, 1931.—Bill of Complaint filed.
Jan. 12, 1931.—Answer filed.
Jan. 12, 1931.—Decree appointing John I. Coulbourn and David Bachman Receivers filed.
Jan. 12, 1931.—Bond of Receivers, with Massachusetts Bonding & Insurance Company surety, in $25000, and Decree approving same filed.
Jan. 13, 1931.—Appearance of S. E. Smith, Esq., for Receivers filed.
Jan. 13, 1931.—Petition of John I. Coulbourn to be discharged as Receiver filed.
Jan. 13, 1931.—Decree appointing H. B. Wilgus Receiver in place of John I. Coulbourn, and discharging John I. Coulbourn as Receiver, filed.
Jan. 15, 1931.—Decree appointing Appraisers filed.
Jan. 15, 1931.—Bond of Receivers in $25,000 with Massachusetts Bonding and Insurance Company surety, and Decree approving same filed.
[fol. 2] Feb. 10, 1931.—Appearance of S. E. Smith, Esq., for H. B. Wilgus and D. Bachman, Receivers, filed.
Feb. 26, 1931.—Petition of B. L. Shapiro for leave to issue execution and Decree granting order on Receivers to show cause why execution should not issue filed.
Feb. 27, 1931.—Appraisement filed.

Mar. 4, 1931.—Answer by Receivers to petition for leave to issue execution filed.

Mar. 10, 1931.—Petition for and Decree granting leave to issue Receivers' Certificates filed.

Mar. 10, 1931, Argued sur petition for leave to issue execution.

Mar. 12, 1931.—Order of Court denying petition for leave to issue execution filed.

Mar. 19, 1931.—Petition by South Atlantic Lumber Company for leave to levy certain goods, etc., filed.

Mar. 23, 1931.—Answer by Receivers to petition by South Atlantic Lumber Company filed.

Apr. 1, 1931.—Opinion, Kirkpatrick, J., dismissing petition by South Atlantic Lumber Co., filed.

Apr. 14, 1931.—Assignments of Error filed.

Apr. 14, 1931.—Petition for appeal by B. L. Shapiro and Decree allowing appeal filed.

Apr. 14, 1931.—Præcipe for transcript of record sur appeal filed.

Apr. 22, 1931.—Decree dismissing petition of South Atlantic Lumber Company for leave to issue execution filed. [fol. 3] Apr. 25, 1931.—Copy of Notice of Appeal by B. L. Shapiro filed.

Apr. 27, 1931.—Citation returned with affidavit as to service endorsed thereon, and filed.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed Jan. 12, 1931

To the Honorable, the Judges of said Court:

John N. McLean and Herbert P. Robinson, bring this their Bill of Complaint and complain as follows:

1. Your complainant, John N. McLean is a citizen of the State of Pennsylvania and resides at Melrose Park, Montgomery County, Pennsylvania.

2. Your complainant, Herbert P. Robinson, is a citizen of the State of Pennsylvania and resides at Noble, Montgomery County, Pennsylvania.

3. Miller Robinson Company is a corporation chartered under the laws of the State of Delaware, having a place of business in the City of Philadelphia, State of Pennsylvania.

4. The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

5. Your complainant, John N. McLean, is a creditor of said respondent on a promissory note for money lent and advanced and liability for which was duly assumed by said respondent and for which and by reason of which respondent is indebted to and owes said complainant the sum of Eight Thousand Dollars ($8,000.00).

[fol. 4] 6. Your complainant, Herbert P. Robinson is the holder of 990 shares of the capital stock of respondent of the par value of Ninety-nine Thousand Dollars ($99,000.00).

7. Said respondent has outstanding capital stock of the par value of One Hundred Thousand Dollars ($100,000.00) and is engaged in the business of the manufacture and sale at wholesale and retail of lumber and millwork.

8. On or about January 10, 1931, respondent owned assets worth, according to its books, the sum of $274,315.82, which assets your complainants believe and therefore aver are, making allowance for reasonable and probable deductions and depreciations, of a just and fair valuation of not less than $274,315.82, and had actual liabilities approximating but not exceeding, as your complainants are informed and believe and therefore aver, the sum of $175,746.59, and was then and there solvent in that its assets greatly exceeded its liabilities at fair valuation. A statement of said company as of January 10, 1931, as the same appears upon the books of respondent is attached hereto, made part hereof and marked "Exhibit A."

9. Complainants aver that the indebtedness of the respondent is represented by open accounts, unsecured obligations in writing, notes, mortgages on real estate, all of which appears in said statement hereto attached. Complainants aver that some of the indebtedness of respondent on open accounts and notes has matured; that others are about to mature; that said respondent while amply solvent

is temporarily embarrassed and if its business can be maintained and continued said respondent will be able to pay in full all indebtedness and the business and its assets saved for the stockholders.

[fol. 5] 10. Complainants aver that some of the creditors to whom respondent is indebted are pressing for immediate payment of their claims; that one has entered suit and threatens to proceed to judgment and execution, that there is great danger of other suits and levies on the property of respondent; that such actions if pursued will result in the sale of the assets of the corporation so that the plant and property thereof will be disintegrated with the consequent impossibility of conducting the business of the respondent.

11. Complainants aver and charge the fact to be that by reason of the foregoing there is great and immediate danger that the assets and property of said respondent will be attached, and levied upon and sold separately by its various creditors; that if through any such execution or foreclosure the assets and property of the respondent are sold, a large part of such assets will inevitably be lost and the business and good will of the respondent will be ruined to the great detriment and damage of the creditors and stockholders of respondent; that if, however, the business of said respondent can be continued and its assets and property protected from levy, the net proceeds will be greatly increased, the moneys and property of the stockholders protected and the best interest of all concerned thereby conserved; that unless the relief hereinafter prayed for be granted, great and irrevocable injury and damage will be caused to complainants and to the creditors of said respondent, as well as to said respondent and its stockholders, and great and unnecessary sacrifice, injury and loss to the rights of the creditors and stockholders will result.

12. Complainants aver that this action is not brought about by any collusion on the part of your complainants or [fol. 6] either of them, either to confer upon this Court jurisdiction of a case of which it would not otherwise have cognizance, or otherwise.

13. In consideration whereof and forasmuch as your complainants are without adequate remedy at law in the premises and therefore require the assistance of a Court of

Equity, where matters of this nature are particularly cognizable and relievable, your complainants pray that a receiver or receivers be appointed according to the form of the statutes in such case made and provided for and of all and singular the business, property and assets of every nature, wheresoever situated, held, owned and controlled by the respondent corporation, with the full power to take into their possession, hold, manage and operate the same under the direction of this Court, with such powers as the Court may, from time to time, grant; to incur such expenses as may be necessary or advisable in connection therewith; to purchase for cash or on credit such supplies, materials or other property as may be necessary or advisable in connection with the administration of the business and assets of the respondent corporation; to sell the merchandise of the respondent corporation, either for cash or credit as said receiver or receivers may deem advisable; to bring suit, or collect, receive and take into their possession all of the property and assets, real or personal, goods, chattels, credits, rights, claims and effects, books, paper and all other property whatsoever, and wheresoever situate of the respondent corporation, to institute, prosecute, become parties to, intervene in, compromise, or defend such suits and actions at law or in equity, for the recovery of or the protection or maintenance of any of the property and assets of the respondent corporation as they may deem necessary or [fol. 7] proper; to settle or compound all or any debts that may be due or owing to said company, as they may deem advisable or proper; subject to the further authorization of this Honorable Court, to pay any such claims for wages or otherwise, as may be decreed by this Court to be entitled to priority; and with the other usual powers of receivers in such cases; and that the officers, managers, superintendents, agents and employees of the said respondent corporation be required forthwith to deliver up to the said receiver or receivers possession of all or every part of the several properties of the respondent corporation, wherever situate, and also the several books, vouchers and papers in any way relating to the business of the said respondent corporation; and that your complainants may have such further or other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please this Honorable Court, the premises considered, to grant unto your complainants the writ of injunction issuing out of and under the seal of this Honorable Court, directed to Miller Robinson Company, its officers, servants and agents, enjoining and restraining them and each of them from exercising any of the privileges or franchises granted by the Act incorporating said company and from collecting or receiving any debts due said corporation and from paying out, selling, assigning or transferring any of the assets, moneys, funds, lands, tenements or effects of said corporation, and also the writ of subpœna of the United States of America likewise issuing out of and under the seal of this Honorable Court to be directed to Miller Robinson Company therein and thereby commanding it to appear before this Honorable Court, according to law and the course of this [fol. 8] Court, at a certain day and under certain penalty therein to be expressed, then and there to answer the premises and to stand to, abide and perform such decrees as your Honorable Court shall seem meet.

May it please this Honorable Court, the premises considered to grant an order enjoining and restraining all persons, firms and corporations from suing the defendant, levying execution upon, attaching, seizing, intermeddling with or taking possession of any of the property of defendant, without leave of your Honorable Court.

14. Such other and further relief as your Honorable Court may deem proper.

And your complainants will ever pray, etc.

Sidney E. Smith, Solicitor for Complainants.

EXHIBIT "A" TO BILL OF COMPLAINT

Assets

Cash on hand	$3,000.00
Accounts Receivable	16,537.41
Notes Receivable	1,200.00
Building and Loan	2,408.15
Land	100,000.00
Equities in real estate	44,235.00
Inventory	52,338.19
Other assets	54,597.07
	$274,315.82

Liabilities

Accounts Payable, mdse.	$7,280.29
Accounts Payable, sundries	1,659.54
Notes Payable, banks	135,950.00
[fol. 9] Notes Payable, Comm.	30,856.76
	$175,746.59

Duly sworn to by John N. McLean and Herbert P. Robinson. Jurat omitted in printing.

[fol. 10] In United States District Court

Answer—Filed Jan. 12, 1931

To the Honorable the Judges of the said Court:

The Answer of Miller Robinson Company to the Bill of Complaint filed in the above case respectfully represents:

1. The respondent admits the averments contained in the aforesaid Bill.

2. The respondent therefore joins in the prayer of the complainants that a receiver or receivers be appointed for it, and further submits itself to such order and decrees as your Honorable Court may deem meet and proper to enter in the premises.

Miller Robinson Company, by Wood Robinson, Secretary and Treasurer.

Resolution

Certified Copy of Resolution Adopted at Meeting of the Board of Directors of Miller Robinson Company

January 12, 1931.

Whereas Miller Robinson Company is being pressed by current merchandise creditors whose claims said corporation although solvent is unable by reason of absence of quick assets to meet;

And whereas the Directors of said corporation have been informed that a Bill in Equity praying for the appoint-

ment of a receiver is about to be applied for in the United States District Court for the Eastern District of Pennsylvania,

[fol. 11] Upon motion duly seconded and carried, the officers of the said corporation are hereby authorized and empowered to execute an Answer to said Bill in Equity, and join in the prayer for a receiver.

Wood Robinson, Secretary and Treasurer.

I hereby certify the foregoing to be a true and accurate copy of Resolution this day passed by the Board of Directors of Miller Robinson Company.

Wood Robinson, Secretary.

Duly sworn to by Wood Robinson. Jurat omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING RECEIVERS—Filed Jan. 12, 1931

And Now, to wit, this 12th day of January, 1931, this cause coming on to be heard, upon consideration of the Bill filed herein and Answer thereto, and on motion of Sidney E. Smith, Esq., it is ordered and decreed that John I. Coulbourn and David Bachman are hereby appointed receivers of all the assets, property, franchises, rights and privileges of whatsoever kind of Miller Robinson Company, within the jurisdiction of this Court, with power to take, hold, demand, sue for, receive and collect all the funds, assets and property belonging to Miller Robinson Company, or in the hands of any debtor, officer, employee, agent, or depository of said Miller Robinson Company and to account to the Court for the same; and all debtors, officers, employees, agents and depositories of said Miller Robinson Company are hereby directed to forthwith pay, deliver and assign all money, securities, assets, and property of every kind whatsoever to said receiver. The said receivers are hereby empowered to bring, prosecute and defend all suits, at law or in equity which in their judgment may seem necessary for the preservation and protection of the property and interests under their control and care; the said receivers shall file an inventory and

appraisement of the property committed to their custody, and shall file their account therefor, and shall distribute the same according to law to the persons entitled thereto, with such other powers as may be necessary and incident to protect the rights and interests of all parties concerned; said receivers to enter security in the sum of $25,000 and Massachusetts Bonding and Insurance Company is hereby approved as such security.

[fol. 13] It is further ordered and decreed that said Miller Robinson Company and its officers, agents and employees are hereby enjoined from retaining or taking possession of the money, or retaining, taking, delivering or assigning any of the assets or property, franchises, rights and privileges of said Miller Robinson Company and from collecting or receiving any of the money, assets, securities or property of said Miller Robinson Company, or in any wise dealing therewith or molesting or interfering with the full and absolute possession or control, possession and/or control thereof by said receiver.

It is further ordered and decreed that said receivers be and are hereby given authority to continue the business of said Miller Robinson Company in its usual course, for the period of six months from the date hereof or until the further order of the Court, with full power to take into their possession, hold, manage and operate the same under the direction of this Court, with such further and additional powers as the Court may, from time to time, grant; said receivers shall have the authority and power to incur and pay such expenses as may be necessary or advisable in connection therewith; to purchase for cash or credit such supplies, materials or other property as may be necessary or advisable in connection with the administration and the operation of the business and assets of said Miller Robinson Company; to manufacture and sell the merchandise of the respondent corporation either for cash or credit as said receivers may deem advisable; to institute, prosecute, become parties to, intervene in, compromise or defend such suits and actions at law or in equity for the recovery and/or the maintenance of any of the property and assets of the respondent corporation as they may deem necessary [fol. 14] or proper; to settle or compound all or any debts that may be due or owing to said company, as they deem advisable or proper; subject to the further authorization of

the Court to pay such claims for wages or otherwise, as may be decreed by this Court as entitled to priority.

It is further ordered and decreed that the officers, managers, superintendents, agents, employees of said respondent corporation and/or other persons having any property or assets of the respondent corporation shall forthwith deliver up to the said receiver all and every part of the several properties of the respondent corporation, wherever situated, and also all books, vouchers and papers in any way relating to or connected with the business of the respondent corporation.

It is further ordered and decreed that an order issue in due and legal form enjoining and restraining all persons, firms and corporations from suing said Miller Robinson Company, levying executions upon, attaching, seizing, intermeddling with, taking and/or retaining possession of any of the property of the defendant without leave of this Court had and obtained.

Leave is hereby granted to said Receiver to apply to the Court for such further and other powers and orders as to them may seem necessary, desirable, or expedient in the cause and the particular circumstances shall require. Further ordered that said Receivers shall deposit any money coming into their hands in a designated depository approved by the Court.

By the Court:

W. H. Kirkpatrick, J.

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER APPOINTING SUBSTITUTED RECEIVER—Filed Jan. 14, 1931

And now, to wit, January 13, 1931, upon consideration of petition of John I. Coulbourn this day presented it is ordered and decreed that said John I. Coulbourn be discharged as one of the receivers of the above entitled Miller Robinson Company and his surety on the bond filed herein be relieved from all liability thereunder.

It is further ordered and decreed that Horace B. Wilgus be and he is hereby appointed receiver in place and stead of said John I. Coulbourn and that the said Horace B. Wilgus and David Bachman be and they have all the powers

and authorities contained and set forth in the order heretofore entered in the above entitled cause on the 12th day of January, 1931, in the order of original appointment of receivers.

By the Court:

W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

PETITION FOR LEAVE TO ISSUE EXECUTION—Filed Feb. 26, 1931

To the Honorable the Judges of the said District Court:

The petition of Bernard L. Shapiro respectfully represents:

1. That your petitioner is plaintiff in a certain action of assumpsit wherein Herbert P. Robinson, one of the complainants in the above entitled cause is defendant.

[fol. 16] 2. That the said action is identified and is pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, and was instituted on the 16th day of January, 1931.

3. That in due course of procedure your petitioner obtained judgment in said action against the said defendant on the fourth day of February, 1931, for the want of a defense, thereupon on the same day damages were assessed in the sum of one thousand and seven dollars and sixty-five cents ($1,007.65).

4. That said judgment is still due and unpaid.

5. That the right of action which was merged in the judgment aforesaid was for money loaned by your petitioner to the said defendant on the 22nd day of October, 1930, in the sum of one thousand dollars ($1,000.00) which the said defendant verbally agreed to repay unto your petitioner on the 19th day of December, 1930, and the said defendant having defaulted in the premises the aforesaid action was instituted against him by your petitioner culminating as above.

6. Your petitioner avers that the said defendant at the time of the procuration of the loan aforesaid from your

petitioner and for some time thereafter, as hereinafter more fully averred, was seized and possessed of great quantities of personal property and numerous parcels of real estate in the City and County of Philadelphia and elsewhere.

7. Your petitioner avers that in anticipation of the judgment aforesaid and other judgments and suits entered and to be entered against the said defendant, he, the said defendant on and before the 9th day of January, 1931, in collusion with other persons presently to your petitioner unknown, with a purpose and intent of hindering, delaying [fol. 17] and defrauding your petitioner and certain other creditors, of him, the said defendant, applied to the duly constituted authorities of the state of Delaware for the end and purpose of having said authorities duly incorporate a certain corporation under the laws of that state known and to be known as Miller Robinson Company.

8. The petitioner avers that pursuant to the plan and scheme aforesaid Miller Robinson Company was on or about the 9th day of January duly incorporated under the laws of the state of Delaware.

9. Your petitioner avers that the said corporation having been so incorporated the said Herbert P. Robinson on or about the 9th day of January, 1931, granted and conveyed all his assets real and personal as far as known to your petitioner to the said corporation, among which was the stock, fixtures, machinery, apparatus, and vehicles constituting and comprising the whole of a retail lumber yard or business located at 6th Street and Sedgley Ave., in the City and County aforesaid.

10. Your petitioner avers that pursuant to pretended grant the said corporation on said day took ostensible possession of said lumber yard and business and the chattels constituting and comprising the same.

11. Your petitioner avers that in furtherance of the fraudulent plan and scheme aforesaid more particularly referred to in paragraph 7 hereof the said corporation at the instance of the said Robinson and one John N. McLean as co-complainant in this cause was summoned as defendant which proceeding was instituted within three days of said grant to wit on or about the 12th day of January, 1931.

12. Your petitioner avers it will by reference to the records in this cause inter alia fully and at large appear that [fol. 18] by the bill of complaint filed in said cause the said Robinson and McLean averred that the said corporation that by reason of the state of its finances was unable to pay its debts though not insolvent, notwithstanding the fact of the receipt of it of all the assets both real and personal of him the said Robinson but three days previously and the fact that its corporate functions and business were in operation not more than three days.

13. Your petitioner avers that by reference to the same bill of complaint it will further inter alia at large appear that the said Robinson and McLean therein prayed that your Honorable Court should appoint receivers to take and receive the assets of the said corporation and administer the same according to the practice in equity.

14. Your petitioner further avers that by further reference to said record it will further inter alia fully and at large appear that the said corporation acting by and through its secretary and treasurer one Wood Robinson whom, your petitioner is informed and believes is the son of the said Herbert P. Robinson on or about the last mentioned date duly filed its answer in said cause, wherein and whereby it admitted all the allegations contained in said bill of complaint and submitted to any decree that your Honorable Court might elect to enter in said cause.

15. Your petitioner avers that thereupon your Honorable Court acting by and through the Honorable W. H. Kirkpatrick one of the judges thereof did on the 12th day of January, 1931, appoint John I. Coulbourn and David Bachman receivers of all the assets of the said corporation and thereafter on the 13th day of January, 1931, by supple- [fol. 19] mentary decree entered by the said Honorable W. H. Kirkpatrick, judge, revoked the appointment of the said John I. Coulbourn as receiver and discharged him from and out of said office and in his place and stead duly appointed one Horace B. Wilgus receiver of the assets of said corporation.

16. Your petitioner avers that thereafter the said Bachman and the said Wilgus duly entered their bond and qualified as receivers of the said corporation.

17. Your petitioner avers that the said receivers having so qualified, they the said receivers in a supposed and pretended right and authority on or about the last mentioned date ostensibly inter alia took and possessed themselves of the chattels and personal property mentioned and described in paragraphs 9 and 10 hereof and presently remain in ostensible possession thereof.

18. Your petitioner avers that by reason of the premises that the whole transaction hereinbefore pleaded and set forth having been initiated and prosecuted by the said Robinson and other persons unknown to your petitioner with the purpose and intent of hindering, delaying and defrauding your petitioner and others creditors of him the said Robinson similarly situated is by the law of Pennsylvania wherein the aforesaid transactions were had and took place illegal, null, void and of no effect.

19. Your petitioner avers that he is advised by counsel and therefore believes and expects to be able to prove as a matter of law that notwithstanding the illegality, nullity and invalidity of the transaction aforesaid as to him, by reason of the ostensible possession of the chattels and personal property as aforesaid by the receivers aforesaid, your petitioner is exposed to the risk of incurring a contempt of Court, in the event of setting on foot appropriate proceed-
[fol. 20] ings to test, nullify and set aside the fraudulent and illegal transaction without precedent leave of court.

20. Your petitioner avers that by the same advice he is informed and believes and expects to be able to prove as a matter of law that by the law of Pennsylvania where the aforesaid personal property and chattels presently remain the appropriate remedy to test, nullify and set aside the fraudulent transaction herein complained of is to levy upon the same and seize the same by virtue of an appropriate writ of fieri facias.

21. Your petitioner avers that unless he be permitted to exercise the legal remedy aforesaid his rights and equities in the premises will be defeated and frustrated and he will be in the peril of the loss of his judgment aforesaid.

Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B.

Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of your petitioner's judgment.

And your petitioner will ever pray, etc.

(Signed) Bernard L. Shapiro, Petitioner.

[fol. 21] *Duly sworn to by Bernard L. Shapiro. Jurat omitted in printing.*

In United States District Court

Order Granting Rule—Filed Feb. 26, 1931

Before Kirkpatrick, J.

And now, to wit, this 26th day of Feby., A. D. 1931, upon consideration of the annexed petition and upon motion of Jacob Weinstein, Esq., solicitor for Bernard L. Shapiro, petitioner, an order is hereby entered upon David Bachman and Horace B. Wilgus, receivers of Miller Robinson Company a corporation incorporated under the laws of the State of Delaware requiring them and each of them to show cause why the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which the petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of [fol. 22] levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of the petitioner's judgment. Hearing hereon to be had on the

4th day of March, A. D. 1931, at 10 o'clock a. m., in room No. 313 Post Office Building, 9th and Chestnut Streets, Philadelphia, Pa.

By the Court. Attest:

George Brodbeck, Clerk.

In United States District Court

Answer of Receivers to Petition of Bernard L. Shapiro for Leave to Issue Execution—Filed Mar. 4, 1931

To the Honorable the Judges of the said Court:

The Answer of Horace B. Wilgus and David Bachman, Receivers appointed by your Honorable Court in the above entitled case, to the petition of Bernard L. Shapiro respectfully represents:

1. Respondents are informed that the averments of paragraph 1 of the petition are true.

2. Respondents are informed that the averments of paragraph 2 of the petition are true.

3. Respondents have no knowledge as to the averments of paragraph 3 of the petition.

4. Respondents believe that the averment of paragraph 4 of said petition is true.

5. Respondents are informed that the averments of paragraph 5 are true.

6. Respondents have no definite knowledge as to the extent of the holdings of said Herbert P. Robinson as the same are averred in paragraph 6 of the petition.

[fol. 23] 7. Respondents aver that they have no knowledge of their own as to the averments in paragraph 7 of the petition. For further answer to said paragraph your respondents aver from information and belief based upon inquiry made by them that the averments of said paragraph are untrue. Respondents further aver, upon information and belief, that there was no collusion on the part of said Herbert P. Robinson with other persons or any intent on the part of said Robinson or other persons to

hinder, delay or defraud the petitioner or any other creditor of him the said Herbert P. Robinson. Respondents respectfully represent to your Honorable Court that the averments in paragraph 7 are immaterial and even if material, are not capable of proof by said petitioner.

8. Respondents are informed and believe and therefore aver that the corporation Miller Robinson Company was on the 9th day of January, 1931, duly incorporated under the laws of the State of Delaware. Respondents on information and belief deny that such corporation was formed pursuant to a plan and scheme to hinder, delay or defraud the petitioner and said other creditors of said Herbert P. Robinson.

9. Respondents on information and belief aver that by bill of sale and divers other conveyances and writings on January 9, 1931, Herbert P. Robinson did convey to the said Miller Robinson Company all his assets, real and personal, constituting the business theretofore carried on by him as a retail lumber yard at 6th and Sedgley Avenue in the City and County of Philadelphia.

10. Respondents aver on information and belief that said corporation thereupon took possession of said business and the assets comprised within the same.

[fol. 24] 11. Respondents on information deny that there was any fraudulent plan or scheme as referred to in paragraph 7 of the petition. Respondents aver that the record shows that the Bill in Equity referred to in said petition was filed on January 12, 1931.

12. Respondents admit that in and by said Bill which is filed of record in this case John N. McLean and Herbert P. Robinson averred that said corporation although solvent was not able to pay its presently accruing indebtedness. Respondents deny that there appears in said Bill the words "notwithstanding the fact of the receipt of it of all the assets both real and personal of him the said Robinson but three days previously and the fact that its corporate functions and business were in operation not more than three days."

13. Respondents admit the averments in paragraph 13 of the petition.

14. Respondents aver that the Answer filed in said proceeding did admit the allegations of the Bill and that in said Answer said Miller Robinson Company submitted itself to any decrees that your Honorable Court should enter.

15. Respondents admit the averments of paragraph 15 of the petition.

16. Respondents admit the averments of paragraph 16 of the petition.

17. Respondents aver that the Receivers having so qualified, entered and took possession of the chattels and property of said corporation but deny that they so did in any supposed or pretended right. Respondents further aver that in so doing they acted in force and authority of the decree theretofore entered by your Honorable Court.

[fol. 25] 18. Respondents on information and belief deny that the said transaction was initiated and prosecuted by said Herbert P. Robinson and other persons for the purpose and intent of hindering, delaying and defrauding the petitioner and other creditors of the said Robinson. Respondents further aver upon information and belief that said corporation was formed for the purpose of carrying on the business of said Herbert P. Robinson and that said corporation immediately upon its formation assumed and agreed to be liable for and to pay all the indebtedness of said Herbert P. Robinson, included in which specifically by name is the indebtedness of the petitioner herein, and that the records of the proceedings of said corporation which are in the possession of your Receivers set this forth at length. Respondents further aver that all of said proceedings in the formation of the corporation and transfer of said property were completed and your Receivers were appointed and had qualified some days prior to the institution of the suit set forth in paragraph 2 of the petition.

19. Respondents are informed that if petitioner transgressed the order of your Honorable Court entered in this matter petitioner would be exposed to the risk of incurring an order in contempt. Respondents aver that the said paragraph 19 of the petition is immaterial.

20. Respondents respectfully submit to your Honorable Court that the averments of paragraph 20 of the petition are not true.

21. Respondents deny that any rights and equities in the premises will be defeated and frustrated and aver that all rights of the petitioner are as well protected as the rights of any other creditor.

[fol. 26] Respondents respectfully suggest to your Honorable Court, in addition to the foregoing answers to the petition, that the allegations in said petition contained are matters immaterial and of no relevancy; that the petition should be dismissed inasmuch as any action by way of issuance of a writ of Fieri Facias against the property in their possession as Receivers of Miller Robinson Company would tend to produce and cause serious and protracted litigation in the State Courts and would seriously interfere with and jeopardize the interests of said Receivers and of the creditors of said corporation including this petitioner and of the stockholders of said corporation.

Wherefore respondents respectfully submit themselves to the further orders of your Honorable Court.

(Sgd.) Horace B. Wilgus, Receiver.

Duly sworn to by Horace B. Wilgus. Jurat omitted in printing.

[fol. 27] In United States District Court

Order sur Petition of Bernard L. Shapiro for Leave to Issue Execution—Filed Mar. 12, 1931

The petition is denied.

By the Court:

W. H. Kirkpatrick, J.

In United States District Court

Petition for Appeal—Filed April 14, 1931

To the Honorable the Judges of said Court:

Now comes the Petitioner, Bernard L. Shapiro, and, deeming himself aggrieved by the final order of this Court, entered in the above entitled cause on the 12th day of

March, 1931, hereby prays that an appeal may be allowed from the said order to the United States Circuit Court of Appeals for the Third Circuit, and that the Clerk of the said District Court, as aforesaid, be directed to prepare and certify a transcript of the record and proceedings in said cause to the United States Circuit Court of Appeals at Philadelphia, Pennsylvania, in accordance with its Rules, in order that the errors complained of in the Assignment of Error-, herewith filed and made a part of this Petition, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

Bernard L. Shapiro, Petitioner. Jacob Weinstein, Attorney for Petitioner, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Apr. 14, 1931

Bernard L. Shapiro, Petitioner in the above entitled cause, having prayed for an allowance of an appeal to the United States Circuit Court of Appeals for the Third Circuit from the final order, made and entered in said cause by the District Court of the United States for the Eastern District of Pennsylvania, on the 12th day of March, 1931, in said cause, and from each and every part thereof, and having presented and filed his Petition for Appeal, Assignment of Errors and prayer for reversal, pursuant to the statutes and rules of the United States Circuit Court of Appeals for the Third Circuit, in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby allowed, as prayed, to the United States Circuit Court of Appeals for the Third Circuit, from the District Court of the United States for the Eastern District of Pennsylvania in this cause, as provided by law; and

It is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and order, in accordance with the statutes and the rules of the said Circuit Court of Appeals, and transmit the same to the said United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, so that it shall

have the same in said Court within thirty days from this date.

Dated the 10th day of April, A. D. 1931.

By the Court:

W. H. Kirkpatrick, Judge.

[fol. 29] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Apr. 14, 1931

The Petitioner, Bernard L. Shapiro, assigns the following errors in the record and proceedings in this cause:

1. That the District Court of the United States for the Eastern District of Pennsylvania in this cause erred in entering the following Order, to wit:

"Sur petition of Bernard L. Shapiro for leave to issue execution.

The petition is denied.

By the Court:

W. H. Kirkpatrick, J."

2. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in refusing to grant the prayer of the Petitioner, which prayer was as follows:

"Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B. Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon seizing and sell-

[fol. 30] ing the same so far as may be necessary to secure full satisfaction of your petitioner's judgment."

3. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in denying the prayer of the petitioner upon the petition of Bernard L. Shapiro, Petitioner.

4. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in failing by opinion, memorandum or other means to indicate upon the record of this cause, the cause of reasons for the entry of the order made herein, or for the refusal to grant the petition as prayed for.

For which errors the Petitioner prays that the said Final Order of the United States District Court for the Eastern District of Pennsylvania, entered in this cause on the 12th day of March, 1931, be reversed and the cause remanded with directions to grant the prayer of the petition, as prayed for by the Petitioner, Bernard L. Shapiro; and for such other and further relief as may be proper in the premises.

Jacob Weinstein, Attorney for Bernard L. Shapiro, Petitioner, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 31] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Apr. 14, 1931

To the Clerk of the said District Court:

In preparing the transcript of the record in the above entitled matter, sur appeal to the United States Circuit Court of Appeals for the Third Circuit, please include therein the following documents and none other:

1. Docket Entries.
2. Bill of Complaint.
3. Answer.
4. Decree Appointing Receivers.
5. Supplementary Decree.
6. Petition of Bernard L. Shapiro.
7. Answer to said Petition, by Receivers.
8. Order of Court Sur Petition. (March 12th, 1931.)
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Assignments of Error.

12. This Præcipe.
13. Clerk's Certificate.

Jacob Weinstein, Attorney for Bernard L. Shapiro, Petitioner-Appellant, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] Minute entry of argument and submission, October 9, 1931, omitted in printing.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1931

No. 4614

BERNARD L. SHAPIRO, Appellant,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of Miller Bobinson Company, Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

OPINION—Filed December 31, 1931

BUFFINGTON, J.:

On January 12, 1931, the Court below, on the petition and bill in equity of John N. McLean, a creditor, and of Herbert P. Robinson, owner of its capital stock, both of whom are citizens of Pennsylvania, took jurisdiction and duly appointed receivers of the Miller Robinson Company, a corporate citizen of Delaware. The receivers at once qualified, took possession of all the assets and are now in possession of the same or their liquidated proceeds.

[fol. 35] Herbert P. Robinson, above named, was the owner of a lumber yard and business in Philadelphia. He had very considerable property and had incurred substantial indebtedness. He was solvent to the extent of a hundred thousand dollars, but creditors threatened suits and the con-

sequent destruction of his business and sacrifice of his assets. To meet this situation, to prevent the sacrifice of his business, to prevent the preference of the threatening creditors, and to conserve the large equity of his creditors and himself in his property, Robinson took the course of an honest man, namely, placing his assets in the hands of a court empowered to thwart preference to one creditor and ensure equality to all through a liquidation of his assets gradually. Had he chosen to do so, he could, under the Pennsylvania practice, have made an assignment of all his assets, but it is clear that this would have laid the grounds for, and practically brought on, a petition in bankruptcy. Under the State law, a receiver cannot be appointed for an individual: 258 Pa. St. 85. So, under the advice of honest and able counsel, he followed the only course open to him to effect his honest purpose of preventing a sacrifice of his property, thwarting all efforts of creditors to get preferences, and ensuring the continuance and gradual liquidation of his business and an equal distribution among all his creditors. With that in view, he procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property, but subject to his debts and on its written agreement to pay all of said debts which, including the debt of the appellant, were specified. With the exception of the two creditors who sought preferences, practically all the creditors were satisfied with the course Robinson took. But two of his creditors, one of whom is the appellant, although their debts were specified and assumed by the corporation, were [fols. 36 & 37] not content with this equality of creditors, but sought to obtain a preference over their fellows. To this effort the Court below refused to become a party and from a decree which ensured the equality of all the creditors and the non-preference of this appellant this appeal was taken.

Passing the motion to quash on the ground the appeal was not taken in due time, we dispose of the case on the merits.

After the Court below had jurisdiction and had taken possession of all the property as above stated, the appellant brought suit against Robinson in a state court, recovered a judgment, and then issued an execution. Thereafter he presented a petition to the Court below in which he

alleged the chartering of the company, the transfer of Robinson's property to it, the filing of the bill, and the appointment of receivers were a fraud—assertions which were denied by answer—and of which unwarranted statements no proof whatever was made. He prayed leave of the Court below to allow him to levy, by his execution, on the property in possession of the Court. On hearing, the Court rightly dismissed his petition. The statement of the facts is a justification of the Court's action and its order is affirmed. As the action of the Court below was embodied in the four word order "The petition is denied", we refer to the opinion of the painstaking Judge who in a similar unwarranted application of another creditor set forth the reasons why such a course would not be sanctioned.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 38] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1931

No. 4614 (List No. 20)

Bernard L. Shapiro, Appellant,

vs.

H. B. Wilgus et al., Rcvrs. Miller Robinson Co., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment—Filed Dec. 31, 1931

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court of March 12, 1931, denying the petition of Bernard L. Shapiro in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, December 31, 1931.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

[fols. 39-48] Petition for rehearing, covering nine pages, omitted from this print. It was denied and nothing more by order of January 28, 1932.

[fol. 49] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Denying Rehearing—Filed Jan. 28, 1932

And now, to wit, January 28, 1932, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

Per Curiam:

—— ——, Circuit Judge.

[File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] Supreme Court of the United States

Order Allowing Certiorari—Filed May 16, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,695. U. S. Circuit Court of Appeals, Third Circuit. Term No. 40. Bernard L. Shapiro, petitioner, vs. Horace B. Wilgus and David Bachman, receivers of Miller Robinson Company. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1932. File No. 36,695.